Supreme Court, U.S.
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No. 95-897

In The

Supreme Court of the United States

October Term, 1995

FRANCES BERNARD AUER, *et al.*,

Petitioners,

v.

DAVID A. ROBBINS, *et al.*,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED FOR REVIEW

1. Are the Secretary of Labor's interpretations of the salary basis requirements for the executive and administrative exemptions in the Fair Labor Standards Act of 1938, as amended (29 U.S.C. § 213(a)(1)) ("FLSA") validly applied to public agencies like the St. Louis Metropolitan Police Department?

2. Should the salary basis requirements for the executive and administrative exemptions under the FLSA be interpreted so that the mere possibility of a disciplinary suspension which might be imposed for non-safety related reasons and which might be imposed for a period less than a full week, is sufficient for any employee or class of employees to be considered non-salaried regardless of actual experience?

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STATEMENT OF THE CASE

Petitioners are or were persons holding the ranks of Sergeant or Lieutenant within the Metropolitan Police Department of the City of St. Louis, Missouri. Respondents are the members of the Board of Police Commissioners, the governing body of the police department, hereinafter referred to as the "Police Board."

This action was originally filed in 1988 by three (3) Sergeants seeking overtime pay under the Fair Labor Standards Act of 1938, as amended (29 U.S.C. § 201, *et seq.*). By the time of trial in 1993, two hundred and eighty-six (286) other Sergeants or Lieutenants were added as party Plaintiffs pursuant to the provisions of 29 U.S.C. § 216(b). That provision of the FLSA allows employees to bring an action for alleged unpaid overtime compensation for and on behalf of themselves and other employees similarly situated. In response to the claims for overtime pay, Respondents asserted the affirmative defenses that Petitioners were exempt executive or administrative employees within the meaning of 29 U.S.C. § 213(a)(1).

All Plaintiffs qualified for the "short tests" for the exemptions under 29 CFR § 541.1(f) and 29 CFR § 541.2(e)(2) because at all times relevant hereto, they were compensated at rates well in excess of Two Hundred and Fifty Dollars ($250.00) per week (Pet. App. 10a-11a). The District Court found that the method of compensation constituted a salary basis within the meaning of the aforesaid regulations. In so ruling, the court granted summary judgment for Respondents on that requirement of the "short tests" and against all Petitioners who were parties to the case at that time. Specifically, the District

Court made a finding that the record was devoid of any evidence of any Departmental procedure for deducting from or "docking" the pay of a Sergeant or higher ranking officer on an hour-by-hour basis because he or she did not work a certain number of hours (Pet. App. 71a-72a). This ruling was later applied to all Petitioners allowed to join as party Plaintiffs by the time of trial. This included Sergeant Michael Guzy.

On appeal, the Eighth Circuit Court of Appeals affirmed the District Court's determination that Sergeants and Lieutenants were paid on a salary basis. The court found it unnecessary to address the question of whether or not the Secretary of Labor's interpretations of the regulations in 29 CFR § 541.1 and 2 on the salary test were validly applied to public sector employees. With the exception of a one-time incident involving a two (2) day suspension of Sergeant Guzy, the circumstances of which were found to be "unique," the court noted there was no evidence that Sergeants or Lieutenants had actually been subjected to improper deductions from their salaries for any reason. The notion that the one-time occurrence in which Sergeant Guzy lost two (2) days pay as a disciplinary measure required a determination that all Petitioners were nonsalaried throughout the period covered by this litigation was rejected. Rather, the Eighth Circuit found that this situation fit squarely within the "window of correction" provision in 29 CFR § 541.118(a)(6) in which the Secretary of Labor has long interpreted the regulations to allow an employer to cure the effects of an improper deduction and preserve the affected employee's salaried status.

Following the Eighth Circuit decision on September 8, 1995, and the issuance of the mandate, judgment was entered for Respondents on all Petitioners' claims in the District Court on December 1, 1995 (Resp. App. 1). The Petition for Writ of Certiorari was received by Respondents' counsel on December 11, 1995.

ARGUMENT

I. The Eighth Circuit Ruling On The Salary Test Is Misrepresented As A Minority View.

All two hundred and eighty-nine (289) Petitioners have now been found to be properly classified as exempt executive or administrative employees and, therefore, not entitled to overtime pay under the FLSA. Petitioners do not challenge the holdings that their primary duty was management of a recognized subdivision of the St. Louis Metropolitan Police Department including directing the work of two (2) or more subordinate employees, in the case of the claimed executive exemption. Likewise, those Petitioners qualifying for the administrative exemption do not challenge the holdings that their primary duty consisted of office or nonmanual work directly related to management policies or the general business operations of the Department, including work requiring the exercise of discretion and independent judgment. No argument is made that Petitioners do not meet the substantive duties tests for exemption. Instead, the Petitioners who clearly hold exempt positions and perform exempt work as management and administrative employees claim they should receive additional compensation under 29 U.S.C. § 207

because they are not paid on a salary basis.[1] The sole reason for this claim is the suggestion that Petitioners are subject to deductions from their pay, in the form of suspensions for less than a full week, for violating certain Department rules or policies in the Disciplinary Code.

Prior to the trial of this case, the Eighth Circuit had already considered and rejected the argument that the possibility of an improper salary deduction alone destroys an employee's salaried status under 29 CFR § 541.1 and thereby renders him/her nonexempt for the entire period of his/her employment. *McDonnell v. City of Omaha*, 999 F.2d 293 (8th Cir. 1993). The petition for writ of certiorari was denied in the *McDonnell* case and there is no reason why the result should be any different in this case. 1145 S.Ct. 1188 (1994). In *McDonnell*, the court noted that the Ninth Circuit which had previously taken a very strict approach to interpreting the salary test in *Abshire v. County of Kern*, 908 F.2d 483 (9th Cir. 1990), failed to consider the difference between private and public sector employees. Since then, the Ninth Circuit reconsidered its position and found the salary basis test, as interpreted by the Secretary of Labor, to be invalid for public sector employees. *SEIU v. City of San Diego*, 35 F.3d 483 (9th Cir. 1994), en banc denied, supp. op., 60 F.3d 1346 (9th Cir. 1995).

Certainly, there is far less confusion and far less of a conflict between the Circuit Courts of Appeals on this

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[1] Petitioners continue to ignore the admissions made by the three (3) original party Plaintiffs, in response to Respondents' Request for Admissions early on in this litigation, that they were paid on an annual salary basis.

narrow issue of law than Petitioners have represented. No longer can the Ninth Circuit be counted as approving of the interpretation urged by Petitioners. In the most recent Seventh Circuit decision on the subject, *Mueller v. Reich*, 54 F.3d 438 (7th Cir. 1995), the court held that disciplinary suspensions of less than a full week could cause public as well as private sector employees to lose their salaried status but the court did not hold that the mere possibility of such an action was sufficient to jeopardize salaried status. Petitioners agree that the Fifth and Eleventh Circuits have aligned with the Eighth Circuit against their interpretation of the salary basis test and the Tenth Circuit chose not to accept their interpretation in *Aaron v. City of Wichita*, 54 F.3d 662 (10th Cir. 1995). Admittedly, the D.C. Circuit seems to be confused on this issue. However, several circuits have not addressed this issue at all. Thus, the suggestion that the Eighth Circuit's holding in this case is a minority view does not comport with the current state of the law.

II. Petitioners' View Of The Salary Test Requires That The Court Ignore Fourteen Years In Which No Sergeant Or Lieutenant Suffered A Deduction From Pay Based On Quantity Or Quality Of Work.

In any event, the facts of this case demonstrate just how absurd and inequitable Petitioners' interpretation of the regulations requiring that exempt executive and administrative employees be paid on a salary basis can be. First of all, Sergeants and Lieutenants employed by the St. Louis Metropolitan Police Department are paid amounts designated as annual salaries which are fixed by Missouri statute. It was in 1979 when officers holding the

rank of Sergeant and above were converted to a straight salary compensation basis. All such officers received an eight percent (8%) increase in compensation at that time in recognition of the fact that they would no longer receive compensatory time off, overtime pay, or other forms of additional compensation regardless of the hours they worked (Pet. App. 45a). Since 1979, Sergeants have received a predetermined amount constituting all their compensation from the Police Department each biweekly pay period, regardless of how much time they spent working on any particular day during the pay period (Pet. App. 43a-46a; 29 CFR § 541.118(a)). Not one (1) of the two hundred and eight-nine (289) Petitioners testified by deposition or at trial that he/she had ever suffered a deduction from his/her salary based on the quantity or quality of work performed.

This case was filed in late 1988 and Petitioners alleged violations of the FLSA back to April 15, 1986, the date the FLSA amendments of 1985 (Pub. Law 99-150) extending coverage to public employers became effective. The case was tried in September, 1993. Yet, in that period of more than seven (7) years, Petitioners were unable to show a single example of a deduction from their pay for a partial day absence. In fact, the Department's Paymaster testified by deposition in 1989 that in the previous twenty-four (24) years, no Sergeant's pay had been docked for an absence of less than a day. Hours worked were not even tracked for Sergeants (Resp. App. 2-8).

In theory, a Sergeant was subject to discipline under Rule 7.004(c) for withdrawing or absenting himself/herself from duty without leave and the penalty could be a suspension of less than a full week (Pet. App. 147a). Even

though there had been no such occurrence between 1965 and 1989 and no evidence of any such occurrence prior to August 19, 1992 when the Secretary of Labor finally amended the regulations to allow public agencies to make deductions for partial day absences, Petitioners maintain that the mere existence of the possibility of various events resulting in an improper deduction should have rendered all Sergeants nonexempt because they were not salaried. Obviously, such a result defies common sense and exalts form over substance.

It is difficult to imagine a better set of circumstances with which to demonstrate the absolute absurdity of Petitioners' legal position than those presented by this case. Technically, any Sergeant or Lieutenant was subject to a deduction from his predetermined biweekly compensation if he/she had been absent without leave because the discipline which might have been imposed could have included a suspension of less than a full work week. There is no evidence that it ever happened in the twenty-eight (28) years prior to trial but that is of no consequence to Petitioners. They argue that the Eighth Circuit should have ignored actual experience and held that they were not paid on a salary basis because sometime, somewhere, somehow, some Sergeant might possibly suffer a reduction in pay due to a disciplinary suspension which might be less than a full week, for violation of a Departmental rule or policy which might not be directly related to safety. 29 CFR § 541.118(a)(5).[2] The Eighth Circuit has

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[2] Petitioners make much of the fact that the Secretary of Labor made some changes in the salary test as applied to public agencies but did not change the interpretation on disciplinary

determined in this case and the *McDonnell* case that it is unwilling to provide a windfall for public employees based on a series of contingencies when no allegedly improper deduction has been made.

III. The Suspension Of Sergeant Guzy Was An Isolated Incident Under Unique Circumstances Which Cannot Be Relied Upon As Evidence That Petitioners Were Not Paid On A Salary Basis.

In this case, Petitioners continue to claim that Sergeant Michael Guzy was the victim of an improper deduction from his salary in 1990. Respondents suggest that their reliance on the Guzy incident indicates just how tenuous the claims that all two hundred and eighty-nine (289) Petitioners were nonsalaried really are. Two hundred and eighty-eight (288) Petitioners could not come up with one (1) single instance in their entire work histories as Sergeants and Lieutenants when they actually suffered a disciplinary deduction in pay for violation of a nonsafety related Department rule. There are more than forty (40) such rules according to Petitioners and Petitioners have been paid on a salary basis according to Missouri law since 1979. Yet, the sum total of evidence adduced at

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deductions for nonsafety related rule violations. Their argument ignores the fact that Section 541.118(a)(5) was not open for comment during the rulemaking procedure which resulted in the promulgation of Section 541.5(d). The Department expressly stated:

> However, the Department expects to consider this issue as appropriate in proposed revisions of Part 541 at a later date.

(Pet. App. 210a).

trial in 1993 to show that Sergeants and Lieutenants suffered allegedly improper deductions from their salaries is a two (2) day suspension to which Sergeant Guzy agreed as part of a negotiated settlement to avoid discharge. Had the Department proceeded to fire Guzy, as originally intended, for allegedly violating the city residency requirement, he would have been considered a salaried, exempt ex-employee.

Because the Department allowed Guzy to save his job by a "plea bargain" which, in part, resulted in a two (2) day suspension, Sergeant Guzy and his two hundred and eighty-eight (288) fellow Petitioners did not suddenly become nonexempt employees entitled to overtime pay back to 1986. This was clearly a unique situation and one which has not recurred and cannot recur because of a 1991 change to the Disciplinary Code. Thus, if Sergeant Guzy was found to have violated the Department's residency rule at any time since 1991, his employment would have been terminated. If his suspension constituted an improper deduction from his salary, as the Eighth Circuit seemingly held without deciding the validity of Section 541.118(a) as applied to Respondents, it would be more logical under the circumstances to allow Respondents to rescind the suspension and terminate Guzy's employment rather than use this incident as a basis for a determination that Petitioners were not paid on a salary basis.

Respondents maintain that the suspension in no way affected Sergeant Guzy's salaried status. In Section 541.118(a), the Secretary of Labor has interpreted payment on a salary basis to mean that an employee is paid a predetermined amount each pay period and that amount may not be subject to reduction based on quantity or

quality of work. The reduction in Sergeant Guzy's salary in one (1) week in 1990 had nothing to do with either the quantity or quality of his work. Thus, Petitioners' argument that an employee need only be subject to a reduction in salary under Section 541.118(a) to lose his/her salaried status does not even apply to this set of facts. Without the Guzy suspension, Petitioners are left with a hollow argument based on a pure technicality when in fact there is no evidence that any Sergeant or Lieutenant ever lost so much as one (1) hour of pay because of variations in the quantity or quality of work performed.

IV. Petitioners' View Of The Salary Test Will Produce An Absurd Result Never Intended By The Secretary Of Labor.

If Petitioners' argument that the mere possibility a salaried executive or administrative employee could be suspended for less than a week as a disciplinary measure for nonsafety related conduct converts him/her to nonsalaried and, therefore, nonexempt status under the FLSA is accepted, how could any such employee in the public or private sector be considered exempt? Is it not always possible that any employer, regardless of the existence of disciplinary rules or policies, could suspend a manager or administrator for one (1) day or two (2) days for work related conduct or performance reasons? Is the Chief of the entire St. Louis Metropolitan Police Department a nonexempt employee who must be paid overtime compensation like hourly employees simply because it is possible that he might be suspended for less than a week by the Board of Police Commissioners as a disciplinary measure? Is it not possible that any president of any

major corporation could be suspended for two (2) days by the corporate board of directors if the board was unhappy with his/her performance? The logical extension of Petitioners' interpretation of the salary test has to be that no employee can be considered exempt because it can always be said that it is possible he/she will suffer an improper deduction in pay at the employer's discretion. Such an interpretation is nonsense and could not have been intended.[3]

The Secretary of Labor has explicitly recognized that even if an impermissible deduction is made from an employee's salary, the employee is not automatically converted to nonexempt status. 29 CFR § 541.118(a)(6). Instead, the Secretary recognizes that the facts of each particular case must be reviewed before a determination can be made as to the effect of the deduction. In this case, the Eighth Circuit considered the two (2) day suspension of Sergeant Guzy, arguably, to be an impermissible deduction but one that did not destroy his exempt status. Clearly, the deduction from his salary was made for reasons other than lack of work and it was an isolated incident which could not recur because of a change in the Disciplinary Code.

As noted by Petitioners, Respondents requested in their brief on appeal, the opportunity to reimburse Sergeant Guzy for the two (2) days pay he lost in 1990 if deemed necessary. As noted herein, Respondents had not

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[3] It should not go unnoticed that not one (1) of the cases relied upon by Petitioners for their position that merely being subject to an improper disciplinary deduction results in the loss of salaried status, was filed by the Secretary of Labor.

conceded that the suspension of Guzy in lieu of discharge constituted an impermissible deduction. However, the Eighth Circuit opinion indicates that the Guzy incident fits within the "window of correction" criteria in Section 541.118(a)(6) which would require reimbursement. Petitioners have emphasized that Sergeant Guzy had not received reimbursement for the period of his suspension as of the date their Petition was filed. Yet, they have not pointed to any requirement that reimbursement be accomplished prior to the time this litigation is concluded. It was not until December 1, 1995 that an Order granting judgment to Respondents in accordance with the Eighth Circuit opinion was entered. In that Order, Petitioners were directed to pay the costs on appeal but they have yet to do so. Respondents have every expectation that Petitioners will reimburse them for the costs at the appropriate time. Conversely, Petitioners can rest assured that Sergeant Guzy will be appropriately reimbursed if the Eighth Circuit decision remains undisturbed. There is no basis for Petitioners to suggest otherwise to this Court.

CONCLUSION

Petitioners have demonstrated no compelling reasons why review on Writ of Certiorari is warranted in this case. If the Court believes that the broader problems presented by the interpretation and application of the salary test to executive and administrative employees of public agencies requires resolution, it has other cases pending in which petitions have specifically and directly raised those issues.

The substantive issues raised by Petitioners in this case are extremely narrow. Contrary to the representations of Petitioners, few courts have actually addressed the narrow question of whether or not just being subject to disciplinary action, which could include a suspension for less than a full week, deprives an otherwise exempt executive or administrative employee of salaried status. Some of the decisions, such as *Kinney v. District of Columbia*, 994 F.2d 6 (D.C. Cir. 1993) and *Martin v. Malcolm Pirnie, Inc.*, 949 F.2d 611 (2d Cir. 1991), which Petitioners cite as evidence of a conflict among the Circuit Courts of Appeal, do not even deal with the question of disciplinary suspensions. Instead, they deal with questions of deductions or contingent deductions for partial day absences, an issue which Petitioners have abandoned in this case.

The Eighth Circuit decision on the facts of this case is not in conflict with the Fair Labor Standards Act, the regulations promulgated pursuant to 29 U.S.C. § 213(a)(1), or even the Secretary of Labor's interpretations of the regulations. The suggestion by Petitioners that the decision on the salary test is unreasonable itself defies reason. Petitioners urge that the Eighth Circuit was wrong because the panel did not ignore the facts that two hundred and eighty-eight (288) of the two hundred and eighty-nine (289) Petitioners had never been subjected to any alleged improper deduction from their salaries during the fourteen (14) year period prior to trial that they were paid on a salary basis. The one-time incident involving one (1) Sergeant would not have occurred if Respondents had not relented and carried out the disciplinary penalty originally imposed. That unique circumstance

could not reasonably be used as a basis to find that all Petitioners are and have been nonexempt employees entitled to additional overtime pay back to 1986. Such a result would be absurd. Even the Secretary of Labor recognized in Section 541.118(a)(6), as did the Eighth Circuit, that an employee or an entire classification of employees does not lose their salaried status just because a deduction is made which is judged to be impermissible.

As for Petitioners' argument that the mere possibility of a deduction from their salaries for nonsafety related rule violations makes them nonsalaried employees, it is readily apparent that such a blanket ruling would produce an even more absurd result. If the "mere possibility" standard is adopted, the white collar exemptions in the FLSA requiring that employees be salaried will be rendered meaningless. That cannot have been the intent of the Secretary of Labor in interpreting the salary basis requirement nor does it comport with common sense. The Eighth Circuit approach, on the other hand, clearly does make sense without undermining the purposes of the FLSA. The decision in this case should not be disturbed.

WHEREFORE, for the reasons stated herein, Respondents respectfully request the Petition for Writ of Certiorari be denied.

Respectfully submitted,

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APPENDIX

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

FRANCES BERNARD AUER, et al.,	)	
Plaintiff(s),	)	**No. 4:88CV02071 GFG**
vs.	)	
ANNE MARIE CLARKE, et al.,	)	
Defendant(s).	)	

ORDER

(Filed Dec. 1, 1995)

This matter is before the Court after affirmance with respect to the issues raised in the appeal and reversal with respect to the issue raised in the cross-appeal by the United States Court of Appeals for the Eighth Circuit. *Auer v. Robbins*, Nos. 94-3355/3534, slip op. (8th Cir. Sept. 8, 1995).

IT IS FURTHER ORDERED that defendants' motion for entry of judgment or, in the alternative, for leave to file bill of costs shall be and it is granted.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that defendants shall have judgment on their cross-appeal.

IT IS FURTHER ORDERED that as directed by the Eighth Circuit, appellees/cross-appellants shall recover from the appellants/cross-appellees the sum of $331.55 as taxable costs on appeal.

Dated this 1st day of December, 1995.

/s/ George F. Gunn, Jr.
GEORGE F. GUNN, JR.
UNITED STATES
DISTRICT JUDGE

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

FRANCES BERNARD AUER, et al., Plaintiff(s), vs. ROBERT BAER, et al., Defendant(s).	)	Cause No. 88-2071-C-4

DEPOSITION OF WITNESS, ROSALIE CORTELYOU, produced, sworn and examined on the part of the Plaintiffs, pursuant to agreement, and pursuant to the following stipulation between the hours of eight o'clock in the forenoon and six o'clock in the afternoon of Friday, September 1, 1989, at the St. Louis Metropolitan Police Department, 1200 Clark Avenue, 6th Floor, in the City of St. Louis, State of Missouri, before me,

LINDA M. DATTILO
Certified Shorthand Reporter
of
CLAYTON REPORTING COMPANY, LTD.,

a Notary Public in and for the County of St. Louis, State of Missouri, in a certain cause now pending in the United States District Court, Eastern District of Missouri, Eastern Division, wherein FRANCIS BERNARD AUER, et al. are the Plaintiffs and ROBERT BAER, et al. are the Defendants.

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Stipulation

Before the taking of the within deposition, the parties, by their counsel, stipulate and agree that same is being taken pursuant to agreement. Counsel further stipulate same may be taken in stenotype and thereafter typed, signature of the witness being expressly waived by consent of counsel and the witness in his own behalf and regularly filed in the case with the same force and effect as though notice had been given.

ROSALIE CORTELYOU,

being produced, sworn and examined on behalf of the Plaintiffs, deposeth and saith:

DIRECT EXAMINATION

BY MR. RIVERA:

Q. Ma'am, could you please state your full name. You can go by your nickname.

A. It's Rosalie Cortelyou.

Q. And Ms. Cortelyou, where do you reside?

A. 2533 Mariner.

Q. And is that in St. Louis City?

A. St. Louis County, 63129.

Q. And where are you currently employed?

A. I'm in the Office Of Budget Finance as the department paymaster.

Q. And how long have you been in that position?

A. Twenty-four years.

Q. You've been the paymaster for twenty-four years?

A. Yes.

Q. How long with the department total?

A. Twenty-five.

Q. What – can you tell me what your duties are as the paymaster?

A. My duty hours?

Q. No. What your duties are. What do your duties consist of?

A. It's to maintain the records of payment of shift and overtime for commissioned and civilian employees of the police department.

Q. What else do you do, anything else other than that? I mean, I realize it's a lot, but I'm just trying to get a categorization of your duties.

A. We make sure the deductions are correct, we distribute the checks, in charge of the duty roster. I don't know how specific you want to get.

Q. Okay. If you – if a person wants a deduction, say, for the United Way, for example, that would go through your office?

A. The authorization cards eventually hit our office, yes.

Q. And does your office do the actual docking? Say a police officer, a regular patrolman, gets docked, say, three hours pay. Would your office be the one to do that?

A. We would get the source document, yes, and our office would dock him.

Q. Would you – You normally on your own don't dock the officer; it's usually somebody instructs you that this officer will be docked and you do the paperwork to dock his pay?

A. That's correct.

Q. And you've got no authority to dock or adjust the pay on your own, other than based on information provided to you you make the adjustments?

A. That's correct.

Q. Are you then in charge of all the overtime to be paid to the police officers?

A. Yes.

Q. Now are there any sergeants in this

* * *

bank and he takes off four hours of the day, would you still take the two hours of overtime from him?

A. If the sergeant submitted the slip we would take the time. He is making the application for that time to take off.

Q. But if it's denied and he takes off anyway, would they still take those two hours of overtime? In other words, if the captain says, no, you can't go off and he leaves, you would still dock him the two hours of overtime, wouldn't you?

A. Not if he didn't fill our the slip. Then he's subject to disciplinary action. Whenever they fill out a slip it's because they are requesting the time off.

Q. Now you testified that nobody – no sergeant to your knowledge has ever been docked –

A. – That's correct.

Q. – for less than a day, but can they be docked for less than a day?

A. For disciplinary –

Q. For not working. Can anybody be docked for not working less than a day?

A. I can't answer that. That's –

Q. Do you know? You don't know or – Your testimony has been that it's never happened and you've never seen it happen?

A. That's correct.

Q. I just want to know from you, can that happen, you get an order from somebody that says dock this sergeant three hours and don't pay him for three hours?

A. It can happen only through disciplinary proceedings from the board of police commissioners. I cannot have a captain call me and say dock this man three hours without documentation. We would not do that.

MR. RIVERA: That's all the questions I have.

MR. KOSTER: I'm not finished.

RECROSS-EXAMINATION

BY MR. KOSTER:

Q. If a sergeant had four hours of overtime left in his bank and he had an excused absence by his commander for a day, would you take the four hours of overtime away from him or would you just leave it sit there?

A. The overtime will sit there unless he filled out a blue slip, an overtime slip. We would not take anything away from him.

Q. So you wouldn't take his overtime away?

• • •

A. Correct.

Q. And that's for patrolmen?

A. Patrolmen.

Q. Now as far as sergeants are concerned, you don't keep track of their hours worked?

A. No.

Q. You don't care how many hours sergeants do work or don't work, you're going to pay them their biweekly salary every two weeks?

A. That's correct.

Q. When a man leaves an hour early to get his hair cut, goes to the dentist, works half a day, whatever, you're going to pay him his biweekly salary, correct?

A. Correct.

Q. And there is no policy of the department that you're aware of to make a deduction from that salary based on a number of – because the individual takes off some particular number of hours, correct?

A. Correct.

Q. So what's the significance – the significance of these hours of overtime that an individual has as a patrolman and he becomes a sergeant and he has this

bank – that really has no significance to you in terms of whether or not you're

• • •